

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

HEDDI LINDBERG,

Plaintiff,

v.

WELLS FARGO BANK N.A., et al.,

Defendants.

No. C 13-0808 PJH

**ORDER DENYING MOTION TO  
REMAND, GRANTING MOTION  
TO DISMISS**

Plaintiff's motion to remand and defendant's motion to dismiss came on for hearing before this court on June 12, 2013. Plaintiff Heddi Lindberg appeared through her counsel, John Holman. Defendant Wells Fargo Bank N.A. ("Wells Fargo") appeared through its counsel, Yaw-Jiun Wu. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby DENIES plaintiff's motion to remand, as stated at the hearing, and GRANTS Wells Fargo's motion to dismiss as follows.

This is a mortgage case. The facts, as alleged in the first amended complaint ("FAC"), are as follows. Plaintiff entered into a loan agreement with World Savings Bank (the predecessor-in-interest to Wells Fargo<sup>1</sup>) in March 2007. The amount of the loan was \$475,000. Plaintiff was having trouble making the mortgage payments, and in 2012, she sought a loan modification from Wells Fargo. Plaintiff was first told that she needed to be in

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<sup>1</sup>In December 2007, World Savings changed its name to Wachovia Mortgage, FSB, and Wachovia was then merged with Wells Fargo.

1 default for three months in order to qualify for a loan modification. Plaintiff was then told to  
2 provide documentation of her income. However, on or about October 10, 2012, plaintiff  
3 received a notice of default from Wells Fargo. Plaintiff claims that she contacted Wells  
4 Fargo, and was told "not to be concerned about foreclosure." But on January 10, 2013, a  
5 notice of trustee's sale was recorded, setting a sale date of February 13, 2013. While  
6 these foreclosure proceedings were going on, plaintiff claims that she was still in  
7 discussions with Wells Fargo about a loan modification. On February 1, 2013, plaintiff  
8 received a letter from Patrick Finnegan at Wells Fargo, asking for additional information  
9 and documents to be provided before February 4, 2013. On February 4, plaintiff contacted  
10 Mr. Finnegan, who maintained that the documents needed to be submitted by the end of  
11 the day. Plaintiff contends that Wells Fargo was "hoping that plaintiff would not be vigilant  
12 with her foreclosure," thus rendering moot her modification application. Plaintiff further  
13 claims that Wells Fargo "never intended to modify her loan." Plaintiff also argues that,  
14 aside from any irregularities in the loan modification process, Wells Fargo lacks authority to  
15 foreclose, because (1) Wells Fargo lost its interest in the loan during the securitization  
16 process, (2) the note has been separated from the deed of trust, because the chain of title  
17 in the note has been broken, and (3) plaintiff's debt has become unsecured.

18 Plaintiff originally filed suit in state court on February 8, 2013, naming as defendants  
19 Wells Fargo and Regional Trustee Services Corporation (together, "defendants").  
20 Defendants removed the case to this court on February 21, 2013. Plaintiff then filed a first  
21 amended complaint ("FAC"), which is the subject of this motion, on March 15, 2013. The  
22 FAC alleges sixteen causes of action: (1) declaratory relief, (2) temporary, preliminary, and  
23 permanent injunction, (3) intentional infliction of emotional distress, (4) negligent infliction of  
24 emotional distress, (5) quiet title, (6) breach of implied covenant of good faith and fair  
25 dealing, (7) deceit - promise made without intent to perform, (8) deceit - intentional  
26 misrepresentation, (9) fraud and deceit - suppression of material fact, (10) fraud and deceit  
27 - negligent misrepresentation, (11) promissory estoppel, (12) negligence, (13) elder abuse,  
28 (14) wrongful foreclosure, (15) violation of Cal. Bus. & Prof. Code § 17200, and (16)

1 cancellation of instruments. On the same day that plaintiff filed the FAC, she also filed a  
2 motion for preliminary injunction, seeking to stop the foreclosure sale of the subject  
3 property. The court denied the motion for preliminary injunction on April 22, 2013. See  
4 Dkt. 27.

5 Now before the court are Wells Fargo's motion to dismiss (filed March 29, 2013) and  
6 plaintiff's motion to remand (filed May 3, 2013). Because plaintiff's motion to remand  
7 presents a threshold jurisdictional question, the court will address that motion first. In her  
8 motion, plaintiff argues that neither of the requirements for diversity jurisdiction is met,  
9 because Wells Fargo "has not shown that the amount in controversy exceeds \$75,000,"  
10 and because both parties are citizens of California. As to the amount in controversy, Wells  
11 Fargo argues that "[i]n actions seeking declaratory or injunctive relief, it is well established  
12 that the amount in controversy is measured by the value of the object of the litigation." Hunt  
13 v. Washington State Apple Advertising Com'n, 432 U.S. 333, 347 (1977). In this case,  
14 plaintiff seeks to invalidate the deed of trust to the subject property (valued at \$565,000)  
15 and seeks a determination that her debt to Wells Fargo (which was \$475,000 at the time of  
16 the loan, and is now \$531,195.49) is invalid. Thus, the court finds that the amount in  
17 controversy in this case does exceed \$75,000.

18 As to the citizenship of Wells Fargo, the court first notes that the Supreme Court has  
19 held that "a national bank . . . is a citizen of the state in which its main office, as set forth in  
20 its articles of association, is located." Wachovia Bank v. Schmidt, 546 U.S. 303, 307  
21 (2006). Plaintiff does not dispute that Wells Fargo's articles of association designate South  
22 Dakota as the state in which its main office is located. However, plaintiff argues that Wells  
23 Fargo should also be considered a citizen of the state in which its principal place of  
24 business is located. Under this view, Wells Fargo would be considered a citizen of both  
25 South Dakota and California, which would preclude diversity jurisdiction in this case, since  
26 plaintiff is also a citizen of California. In support of her argument, plaintiff cites to a handful  
27 of cases from district courts in California. See, e.g., Martinez v. Wells Fargo Bank, 2013  
28 WL 2237879 (N.D. Cal. May 21, 2013); Goodman v. Wells Fargo Bank, 2011 WL 2372044

(C.D. Cal. June 1, 2011); Saberi v. Wells Fargo, 2011 WL 197860 (S.D. Cal. Jan. 20, 2011). In each of these cases, the court found that the Ninth Circuit's opinion in American Surety Co. v. Bank of California, 133 F.2d 160 (9th Cir. 1943), which held that banks are citizens of the state in which their principal place of business is located, was not expressly overruled by Schmidt. In their (and plaintiff's) view, Schmidt allows for the possibility that a bank can be a citizen of both the state designated in its articles of association and that state in which its principal place of business is located. However, in the absence of any clear post-Schmidt authority from the Ninth Circuit, the court declines to adopt this "dual citizenship" argument. Instead, consistent with Schmidt, the court finds that Wells Fargo is a citizen of South Dakota, and not of California. Thus, both requirements of diversity jurisdiction are met, and plaintiff's motion to remand is DENIED.

Turning to Wells Fargo's motion to dismiss, the court first notes that plaintiff alleges four general categories of allegedly wrongful conduct on the part of Wells Fargo. These four categories of conduct are spread across plaintiff's sixteen asserted causes of action. The four categories are as follows: (1) claims related to the origination of plaintiff's loan; (2) claims that Wells Fargo did not have standing to foreclose on the subject property; (3) claims that Wells Fargo committed fraud in the loan modification process; and (4) claims that Wells Fargo engaged in "dual tracking" by initiating foreclosure proceedings while plaintiff was attempting to negotiate a loan modification.

As to category (1), claims related to the origination of plaintiff's loan, the court first notes that claims related to the origination of mortgage loans are expressly preempted by the Home Owners' Loan Act of 1933 ("HOLA"). However, at least one of plaintiff's loan origination claims (specifically, the eighth cause of action) alleges fraud in the origination of her loan, which would exempt the claim from HOLA preemption. Instead, to the extent that plaintiff's loan origination claims allege fraud, the court finds such claims to be time-barred by the three-year statute of limitations applicable to fraud claims. Plaintiff's loan was originated on or about March 15, 2007, but plaintiff did not file suit until February 8, 2013. Thus, the court finds that plaintiff cannot state a claim for any conduct related to the

1 origination of her loan. The court will address the specific causes of action affected by this  
2 finding below.

3 As to category (2), plaintiff alleges that Wells Fargo lacks standing to foreclose,  
4 because it is not in possession of the original note, because the chain of title to the subject  
5 property has been broken, and because plaintiff's loan has been securitized, which  
6 extinguishes Wells Fargo's interest in the subject property. The court notes that plaintiff's  
7 opposition brief does not substantively address these arguments, and instead focuses on  
8 her loan modification and dual tracking arguments. Regardless, the judicially noticeable  
9 documents submitted by Wells Fargo establish that there was no assignment of the deed of  
10 trust; instead, the original lender (World Savings) changed its name to Wachovia Mortgage,  
11 FSB, which was then merged with Wells Fargo Bank. The court further finds that Wells  
12 Fargo need not demonstrate ownership of the original note in order to foreclose. See, e.g.,  
13 Hafiz v. Greenpoint Mortgage Funding, Inc., 652 F.Supp.2d 1039, 1043 (N.D. Cal. 2009).  
14 Finally, the court finds that plaintiff makes no non-conclusory allegations that her specific  
15 loan was securitized, nor does she present any authority for her argument that  
16 securitization would preclude Wells Fargo from foreclosing. The court also notes that  
17 HOLA preemption provides an independent basis for dismissing these "standing to  
18 foreclose" claims. See, e.g., Ahmed v. Wells Fargo, 2011 WL 1751415 (N.D. Cal. May 9,  
19 2011); DeLeon v. Wells Fargo, 729 F.Supp.2d 1119 (N.D. Cal. 2010).

20 As to category (3), plaintiff alleges that Wells Fargo told plaintiff to stop making loan  
21 payments in order to qualify for a loan modification, that she did indeed stop making loan  
22 payments in reliance on that promise, and that she defaulted on her loan as a result.  
23 Taken as true, these allegations could potentially state a claim for fraud, promissory  
24 estoppel, and/or violation of Cal. Bus. & Prof. Code § 17200. As discussed above, plaintiff  
25 spreads these loan modification claims across many of her sixteen asserted claims. Those  
26 claims will be discussed more fully below.

27 Finally, as to category (4), plaintiff alleges that Wells Fargo improperly engaged in  
28 "dual tracking" by initiating foreclosure proceedings while plaintiff was still negotiating a

1 loan modification. For support, plaintiff relies on the recently-passed California  
2 Homeowners' Bill of Rights ("HBOR"), which prohibits such dual tracking. However, the  
3 statute prohibits foreclosure only after "a foreclosure prevention alternative is approved in  
4 writing," and if the "borrower is in compliance with the terms of a written trial or permanent  
5 loan modification, forbearance, or repayment plan." Cal Civ. Code § 2924.11(a). Plaintiff  
6 does not allege that any loan modification plan was actually approved, and instead claims  
7 only that she was "working on securing a loan modification." Thus, plaintiff's dual tracking  
8 arguments do not have merit.

9 Applying these findings to plaintiff's sixteen causes of action, the court first finds that  
10 plaintiff's first cause of action (for declaratory relief) is based on her claims that Wells Fargo  
11 does not own the original note and that her loan was securitized. Thus, for the reasons  
12 described above, plaintiff's first cause of action is DISMISSED. Because plaintiff has not  
13 provided any authority to show that these allegations may state a viable claim, the  
14 dismissal is with prejudice.

15 Plaintiff's second cause of action is for a "preliminary and permanent injunction."  
16 Wells Fargo points out that injunctive relief is a remedy, not a cause of action, and plaintiff  
17 does not dispute this point in her opposition. The court agrees, and DISMISSES plaintiff's  
18 second cause of action with prejudice.

19 Plaintiff's third cause of action is for intentional infliction of emotional distress, and  
20 appears to be based on both the origination of plaintiff's loan and on the attempted loan  
21 modification. To the extent this claim is based on loan origination, it is time-barred and  
22 DISMISSED with prejudice. To the extent this claim is based on loan modification efforts,  
23 plaintiff has not (and cannot) allege that Wells Fargo's behavior was sufficiently  
24 "outrageous" to give rise to an emotional distress claim. Thus, plaintiff's third cause of  
25 action is DISMISSED with prejudice.

26 Plaintiff's fourth cause of action is for negligent infliction of emotional distress, and is  
27 based only on the attempted loan modification. Plaintiff concedes that she needs to allege  
28 the existence of a legal duty to use reasonable care in order to state a claim, and concedes

1 that a usual lender of money owes no duty to the borrower, but argues that Wells Fargo  
2 went “far beyond the domain of the usual money lender.” However, neither the FAC nor  
3 plaintiff’s opposition brief allege any facts that support this legal conclusion, and instead  
4 allege only that Wells Fargo ultimately did not offer to modify plaintiff’s loan. Thus, plaintiff  
5 has not adequately alleged that Wells Fargo owed her a duty that was breached, and  
6 plaintiff’s fourth cause of action is DISMISSED with prejudice.

7 Plaintiff’s fifth cause of action is for “quiet title to real property,” and is based on her  
8 allegations that Wells Fargo does not possess the promissory note. As explained above,  
9 plaintiff’s note ownership claims lack merit, and thus cannot give rise to a cause of action to  
10 quiet title. Moreover, to state a claim for quiet title, plaintiff must allege a credible offer to  
11 tender the indebtedness. See, e.g., Collins v. Power Default Services, Inc., 2010 WL  
12 234902 (N.D. Cal. Jan. 24, 2010). Plaintiff has not alleged such a tender, and instead  
13 argues that there is no tender requirement for this claim. The court disagrees, and  
14 DISMISSES plaintiff’s fifth cause of action with prejudice.

15 Plaintiff’s sixth cause of action is for breach of the implied covenant of good faith.  
16 According to the FAC, this claim is based on four categories of conduct: (1) failure to  
17 “evaluate plaintiff’s condition for foreclosure avoidance;” (2) failure to “advise plaintiff of her  
18 statutory right to meet with defendants regarding such foreclosure avoidance;” (3) advising  
19 plaintiff to stop payments in order to qualify for a loan modification; and (4) continuing with  
20 foreclosure proceedings while plaintiff was attempting to get a loan modification. FAC, ¶¶  
21 68-69. Plaintiff does not make clear which contract forms the basis of this claim. To the  
22 extent this cause of action is based on the original loan agreement, there is no allegation  
23 that the agreement provided for or even contemplated a loan modification, so Wells Fargo’s  
24 alleged failure to properly evaluate/advise would not constitute a breach of any implied duty  
25 under that contract. And because there was never any agreement regarding a loan  
26 modification, plaintiff cannot argue that Wells Fargo breached an implied duty under a  
27 modification contract. While these allegations regarding the modification would properly fall  
28 under a fraud-type claim (which will be addressed below), they do not state a claim for



1 breach of an implied duty of good faith. Thus, plaintiff's sixth cause of action is  
2 DISMISSED with prejudice.

3 Plaintiff's seventh cause of action is for "deceit - promise made without intent to  
4 perform," and is premised on plaintiff's attempted loan modification. Plaintiff alleges that  
5 she was promised a loan modification if she submitted the necessary paperwork, that she  
6 was told to stop making payments in order to qualify for a modification, and that no  
7 foreclosure would occur until the loan modification process was completed. FAC, ¶ 71.  
8 Taken as true, these allegations could state a claim for fraud, assuming they are pled with  
9 the required "particularity" under Rule 9(b). A fraud claim requires (1) a false  
10 representation as to a material fact; (2) knowledge of its falsity; (3) intent to defraud; (4)  
11 actual and justifiable reliance; and (5) resulting damage. Wilhelm v. Pray, Price, Williams &  
12 Russell, 186 Cal.App.3d 1324, 1331 (1986). Rule 9(b) further requires that fraud claims  
13 allege the "who, what, when, and where" of the allegedly fraudulent statements. Plaintiff  
14 has identified the "what," and makes a general allegation regarding the "when," but  
15 otherwise falls short of this pleading standard. Thus, plaintiff's seventh cause of action is  
16 DISMISSED, but plaintiff shall have an opportunity to amend this cause of action to satisfy  
17 Rule 9(b)'s pleading standard. Plaintiff's amended complaint must specifically allege what  
18 the material false representations were, who made them, and when and where they were  
19 made.

20 Plaintiff's eighth cause of action is for "deceit - intentional misrepresentation," and is  
21 based on the origination of plaintiff's loan. Plaintiff alleges that she was "unaware that  
22 World Savings was operating in the subprime loan market," and that the "deal was in  
23 actuality fake." FAC, ¶ 82. Plaintiff further alleges that the facts underlying this claim  
24 "could not have been discovered sooner" because "defendants continually told these lies to  
25 plaintiff telling her that plaintiff would not be put into foreclosure." FAC, ¶ 85. Here, plaintiff  
26 muddles her loan modification allegations with her loan origination allegations, but it  
27 appears that the loan modification allegations are intended to support her tolling argument.  
28 In any case, plaintiff does not identify any specific misrepresentation during the origination



1 of her loan, and does not adequately allege any basis for tolling her claims. Thus, the court  
2 finds that plaintiff's claim is time-barred. Plaintiff's eighth cause of action is DISMISSED  
3 with prejudice.

4 Plaintiff's ninth cause of action is for "suppression of material facts." A claim for  
5 fraud by non-disclosure requires (1) a fiduciary or confidential relationship, (2)  
6 nondisclosure, (3) intent to deceive, and (4) reliance and resulting injury. See, e.g.,  
7 Johannson v. Wachovia Mortgage FSB, 2011 WL 3443952 (N.D. Cal. Aug. 5, 2011).  
8 However, "[a]bsent special circumstances, a loan does not establish a fiduciary relationship  
9 between a commercial bank and its debtor." Das v. Bank of America, 186 Cal.App.4th 727,  
10 741 (2010). Thus, plaintiff cannot allege each element of this claim, and for that reason,  
11 plaintiff's ninth cause of action is DISMISSED with prejudice.

12 Plaintiff's tenth cause of action is for "fraud and deceit - negligent  
13 misrepresentation." In order to state a claim for negligent misrepresentation, plaintiff must  
14 allege the existence of a duty of care between herself and Wells Fargo. See Ditto v.  
15 McCurdy, 510 F.3d 1070, 1078 (9th Cir. 2007). As explained above, a usual lender of  
16 money owes no duty to the borrower. Thus, plaintiff cannot state a claim for negligent  
17 misrepresentation, and the tenth cause of action is DISMISSED with prejudice.

18 Plaintiff's eleventh cause of action is for promissory estoppel, and is based on her  
19 attempted loan modification. A claim for promissory estoppel requires (1) a clear and  
20 unambiguous promise, (2) reliance by the party to whom the promise was made, (3) that  
21 the reliance be reasonable and foreseeable, and (4) injury caused by the reliance. Laks v.  
22 Coast Fed. Sav. & Loan Ass'n, 60 Cal.App.3d 885, 890 (1976). Plaintiff's allegations are  
23 similar to her allegations with respect to her seventh cause of action - but because this  
24 claim does not sound in fraud, Rule 9(b)'s particularity requirements do not apply here.  
25 However, plaintiff has not identified the "clear and unambiguous" promise made by Wells  
26 Fargo. Instead, plaintiff alleges (in her opposition brief) that Wells Fargo promised her a  
27 loan modification "with reasonable terms." The court notes that "reasonable terms" cannot  
28 constitute a clear and unambiguous promise, and finds it likely that this case is similar to

1 Cabanillas v. Wachovia, in which the court found that the bank “merely promised to  
2 consider and evaluate” a request for modification, but did not promise an actual  
3 modification. See Case No. 12-0228 (C.D. Cal. Mar. 20, 2012). However, the court will  
4 DISMISS the eleventh cause of action with leave to amend, to allow plaintiff an opportunity  
5 to allege a sufficiently “clear and unambiguous” promise.

6 Plaintiff’s twelfth cause of action is for negligence. As explained above, plaintiff must  
7 allege the existence of a duty of care between herself and Wells Fargo in order to state a  
8 claim for negligence. See Ditto v. McCurdy, 510 F.3d 1070, 1078 (9th Cir. 2007). And  
9 because a usual lender of money owes no duty to the borrower, plaintiff’s twelfth cause of  
10 action is DISMISSED with prejudice.

11 Plaintiff’s thirteenth cause of action is for elder abuse, and is based entirely on the  
12 origination of plaintiff’s loan. As discussed above, all loan origination claims are time-  
13 barred, and thus plaintiff’s thirteenth cause of action is DISMISSED with prejudice.

14 Plaintiff’s fourteenth cause of action is for wrongful foreclosure, and is based on  
15 HBOR’s prohibition of “dual tracking.” As explained above, HBOR prohibits the initiation of  
16 foreclosure proceedings only “if a foreclosure prevention alternative is approved in writing.”  
17 Cal. Civ. Code § 2924.11. Plaintiff concedes that no loan modification (or other foreclosure  
18 prevention alternative) was ever approved; thus, plaintiff’s fourteenth cause of action is  
19 DISMISSED with prejudice.

20 Plaintiff’s fifteenth cause of action alleges a violation of Cal. Bus. & Prof. Code §  
21 17200, and is largely derivative of plaintiff’s other claims. As a result, this claim rises and  
22 falls with those claims. Thus, to the extent that this claim is based on allegations of fraud in  
23 the loan modification process, it is DISMISSED with leave to amend. To the extent that this  
24 claim is based on plaintiff’s other allegations (loan origination, standing to foreclose, dual  
25 tracking), it is DISMISSED with prejudice.

26 Plaintiff’s sixteenth cause of action is for “cancellation of instrument,” and is based  
27 on allegations that Wells Fargo lacked standing to foreclose on the subject property  
28 because of improprieties regarding the chain of title. As discussed above, plaintiff has not

1 adequately alleged any problem in the chain of title, and as a result, plaintiff's sixteenth  
2 cause of action is DISMISSED with prejudice.

3 In sum, the FAC is dismissed in full, with leave to amend granted only as to the  
4 seventh (fraud), eleventh (promissory estoppel), and fifteenth (section 17200) causes of  
5 action, and only to the extent that those causes of action are based on plaintiff's attempted  
6 loan modification. Plaintiff is directed to file a second amended complaint, in accordance  
7 with this order, no later than **August 8, 2013**. The second amended complaint must be  
8 limited to the three causes of action described above, and cannot contain any allegations  
9 regarding the origination of plaintiff's loan, defendants' standing to foreclose, or defendants'  
10 alleged "dual tracking." No new parties may be added without leave of court. Defendants  
11 shall have until **August 29, 2013** to answer or otherwise respond to the complaint.

12 Finally, Wells Fargo's request for judicial notice is GRANTED.

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14 **IT IS SO ORDERED.**

15 Dated: July 9, 2013



16 PHYLLIS J. HAMILTON  
17 United States District Judge  
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